No. 83-273

In The Supreme Court Of The United States

October Term, 1983

HELEN GALARDO dba TERM-CON ELECTRONICS and WILLIAM D. BUCHANAN dba CKG ASSOCIATES,

Petitioners,

vs.

AMP INCORPORATED and AMP PRODUCTS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents AMP Incorporated ("AMP") and AMP Products Corporation ("APC") oppose the grant of a writ of certiorari in this case to review the unanimous judgment of the United States Court of Appeals for the Ninth Circuit in affirming the District Court's directed verdict

in respondents' favor on petitioners' antitrust claims.

Respondents have no disagreement with the Petition as to reproduction of the opinion below in the appendix ("Appx.") to the Petition, the jurisdiction, or the statute involved (15 U.S.C. § 1) and its reproduction in the Petition. Respondents do not agree that the District Court's opinion has been accurately reproduced in the appendix to the Petition. 1/

1/ Specifically, the following crucial text has been omitted from the appendix at p. 33, following the 7th line from the top:

> "the record from which the jury could conclude that plaintiffs' definition is accurate. For example, plaintiffs merely assert that Picabond sales to the government constitute a relevant".

Galardo v. AMP Inc., 1982-1 CCH Trade Cas. ¶ 64,468, at 72,769 (N.D. Cal. 1982).

STATEMENT OF FACTS

This private action sought recovery under California contract law and federal and California antitrust laws for injuries to petitioners' businesses.

Respondent AMP and its wholly-owned subsidiary, APC, engage in the manufacture, sale, and distribution of electrical and electronic connectors, terminals, splices, and related parts and components. AMP's 14 Engineering Divisions manufacture approximately 105,000 such devices, T. 1287, 1295-96, 1993, each of which has been assigned a unique, five-to-nine digit part number. DX 900A; CX 7.

Under the admitted, unified control of common officers and directors, T. 2844, respondents market these devices through four domestic marketing organizations: the AMP Industrial Sales ("Industrial")

and AMP Data Systems ("Data Systems") Divisions of the parent, and the AMP Telecommunications ("Telecom") 2/ and AMP Special Industries ("ASI") Divisions of the subsidiary. T. 1191, 1217, 1271, 1335-37. In the relevant period, such marketing efforts converged at, and were controlled ultimately by, one person: the Vice President of Sales of the parent, AMP. T. 1196, 1217, 1271, 1335-37.

Petitioners' differences with respondents concern alleged misconduct by the Industrial and ASI marketing organizations. Industrial's marketing focus is larger original equipment manufacturers ("OEMs") not assigned to Telecom and Data

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2/ Telecom sells the principal products at issue herein, a family of telephone splices denominated "Picabonds", to numerous operating telephone companies and their "supply houses". T. 708, 1221, 1988-89, 2016-17.

Systems, and includes end users in the aerospace and communications, consumer and commercial, industrial controls and processes, and automotive, marketplaces. T. 1265, 1820, 2334. ASI, on the other hand, "primarily" addresses the "aftermarket" of maintenance and repair, T. 1867, 1963-64, and smaller OEMs otherwise within the marketing responsibilities of Industrial, Telecom, and Data Systems, T. 1737, as well as smaller OEMs in such diverse areas of the economy as railroads and airlines, military and shipbuilding, power utilities, gas, modular homes, recreational vehicles, and electrical transformers. T. 785, 790, 1818.

In their dealings with respondents, petitioners' "primary objective was to take and continually get better pricing", PX 195; T. 259, and "special pricing".

T. 2432. How this was accomplished was described in the testimony of a former Industrial salesman who had been assigned petitioner CKG's account:

> "Q. So you're saying in trying to sell Mr. Buchanan, you first told him who made a competitive product, and then he went out and got a quote on that competitive product and he came back to you and said, now beat this quote?
>
> "A. I don't remember if that was the way it took place or not.
>
> "Q. Wasn't that a strange way to sell?
>
> "A. Well, it may be, it may not be. I didn't have, you know, I was brand new, I didn't have much direction.
>
> "Q. I get it.
>
> "A. So a lot of it was floundering."

T. 740-41.

By such means, petitioners obtained unique, preferential pricing on AMP's Picabond telephone splices extended to no

other customer of respondents. PX 227, 236; T. 940, 1928, 1933, 1951, 1954, 2683.

The nature of petitioners' method of doing business was described by ASI's General Sales Manager as follows:

> "the company involved -- one of the two -- had, in fact purchased the [Picabond] product from . . . [Industrial] through one company [i.e., CKG] and then bid it to the Government through the other [i.e., Term-Con]"

against ASI. T. 1896.

Upon notice to ASI from the government that petitioner Term-Con had been awarded a government contract calling for the supply of Picabonds, an investigation was undertaken by respondents to determine who Term-Con was; who its source of Picabonds was; the nature of the relationship between petitioners; and the propriety of the unique prices at which

Industrial had been induced to sell such parts to petitioner Buchanan. T. 852-989, 1007-18, 2420-23, 2432. Having concluded that petitioners should, and would, be treated like any other purchaser of Picabonds, PX 195; T. 1509-14, 2406-08, 2420-23, 2432, petitioners were advised that respondent AMP was

> "hereby withdrawing the quotation of June 22nd [, 1979]; and all future orders from your company for this [Picabond] part number will be quoted on the basis of our standard book prices."

PX 261, 263, 264, 270, 270, 272. As is evident, respondents were not deprived of access to Picabond parts, but merely to preferential pricing. T. 259, 2432.

This litigation ensued. Following six weeks of trial, respondents were granted a directed verdict on petitioners' antitrust claims on at least two independent bases:

(a) their inability, as parent and subsidiary, to conspire

> "in view of substantial evidence that AMP and APC are jointly managed by a single group of directors, that policy decisions affecting both companies emanate from the parent, and that they neither regularly compete nor hold themselves out as competitors",

Appx. 22; and

> (b) "because plaintiffs have failed to elicit evidence from which a jury could conclude that competition in a definable market has been injured."

Appx. 34. 3/

3/ Additional bases for the District Court's directed verdict in respondents' favor included:

1. the vertical, parent-subsidiary relationship between respondents, Appx. 26;

2. petitioners' failure to either allege or prove "that defendants

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Petitioners' remaining, common-law, contract claims were tried to the jury. That body returned a special verdict finding that while respondent AMP and petitioner Buchanan had entered into 38 separate agreements calling for the supply of an equal number of specified, AMP-manufactured parts by the former to

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[FOOTNOTE CONT'D. FROM PREVIOUS PAGE]

have deprived them of the essentials for competition -- defendants' products -- but instead, only of preferential pricing", Id.

3. the lack of any case precedent "suggest[ing] that a parent corporation's decision to withdraw preferential pricing from a competitor of its wholly owned subsidiary should be judged by the per se standard", Appx. 28; and

4. petitioners' "failure to define adequately a relevant market and submarket" on its 15 U.S.C. § 2 claim. Appx. 35.

Petitioners do not here challenge these findings of the District Court.

the latter, AMP had not breached any such contract. T. 4106-13. Jury instructions concerning such contract claims were unsuccessfully challenged by petitioners below, Appx. 4-6, but such grounds of alleged error are not pursued here.

REASONS FOR DENYING WRIT

A. This Court Need Not Resolve Any Conflict Between Decisions of the Courts of Appeal Concerning the "Intra-corporate Conspiracy" Doctrine Because Any Such Resolution Is Irrelevant to the Outcome of This Case.

The principal thrust of the Petition is that a conflict allegedly exists between decisions of the Courts of Appeal for the Third and Ninth Circuits, and that this case ought to be used as a vehicle for resolving that conflict or, alternatively, that this case ought to be consolidated with Copperweld Corp. v. Independence Tube Corp., No. 82-1260, cert. granted, 51 Law Week 3687 (June 20, 1983).

Even assuming such a clear conflict between the Courts of Appeal to exist, its resolution is irrelevant to the ultimate outcome of this case. Sommerville v. United States, 376 U.S. 909 (1964) (resolution of the conflict could not change the result reached below, since the petitioner would be liable under either federal or state law).

Thus, petitioners do not here challenge the jury's special verdict that respondent AMP had not breached any of the 38 contracts calling for the supply of parts to petitioners which the jury found to exist. Should this Court grant the writ, alter the standards for determining the existence of an "intra-corporate conspiracy", and remand, there will be no issue for a newly convened jury to try. That result follows, as the District Court observed, because:

> "[a]ccording to plaintiffs, beginning in the spring of 1979, defendants initiated a conspiracy to eliminate CKG and Term-Con as competitors in the sale and distribution of AMP products by refusing to perform allegedly valid contracts . . . ."

Appx. 12 (emphasis supplied).

The unchallenged law of the case is that respondents did not refuse to perform any contract entered into by them. Accordingly, a grant of the writ in this case cannot change the result reached below.

B. This Court Should Adhere to Its Standard Practice of Refusing to Review Concurrent Findings of Fact by the Two Courts Below.

If it appears upon a grant of the writ that this Court might be able to decide the case on another, substantial ground, and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient for granting

review. Sanson Hosiery Mills v. N.L.R.B., 344 U.S. 863 (1952). In addition, this Court has usually denied certiorari when review is sought of lower court decisions requiring an analysis of the particular facts involved. On this point, Mr. Justice Holmes observed, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). Especially is this so where the findings of fact made by the district court receive the concurrence of the court of appeals. Graver Tank & Manufacturing Co. v. Linde Air Products Co., 337 U.S. 271, 275 (1949).

Here, the District Court and a unanimous Court of Appeals concurred in their alternative determinations that

(a) respondents, as parent and subsidiary, lacked the capacity to conspire; and

(b) petitioners "have failed to elicit evidence from which a jury could conclude that competition in a definable market has been injured." Appx. 3-4, 34.

The courts below correctly assessed the facts adduced by petitioners at trial supporting the second of their two, alternative, bases for decision.

1. A Brown Shoe "Submarket" Defined by "the Sale of AMP Parts (or AMP Pica-bond Parts) to the United States Government" Was Not Proven By Petitioners.

The "two-court factual concurrence rule" notwithstanding, it is contended that neither the District Court, nor the Court of Appeals, "examined Petitioner's evidence in light of either of" United

States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1956), or Brown Shoe v. United States, 370 U.S. 294 (1962).

Petition, at 27.

In Brown Shoe, supra, this Court wrote:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. [footnote omitted] However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

370 U.S. at 325.

Under a rigorous, demand-side analysis, it would not be unusual to find a relevant market defined in terms of a particular, government-specified product, and some courts have reached precisely that result. 4/ Obviously, however, if a particular product, such as AMP's Picabond, is sold to a number of customers, of which the government is only one, it is inappropriate to limit the market to include only government sales. As the District Court below observed:

4/ Northrop Corp. v. McDonnell Douglas Corp., 498 F.Supp. 1112, 1123 (C.D. Cal. 1980) (relevant product market held to be F-18 weapons systems); American Standard, Inc. v. Bendix Corp., 487 F.Supp. 265, 270 (W.D. Mo. 1980) (relevant market assumed to be APX-72 transponders); Ovitron Corp. v. General Motors Corp., 295 F.Supp. 373, 376 (S.D.N.Y. 1969), 364 F.Supp. 944 (S.D.N.Y. 1973), aff'd, 512 F.2d 442 (2d Cir. 1975) (relevant product market held to be squad radios).

> "Although on occasion a single manufacturer's products may constitute a relevant market, Bushie v. Stenocord Corp. [1972 TRADE CASES ¶ 73,896], 460 F.2d 116 (9th Cir. 1972), plaintiffs have failed to demonstrate why that should be true in this case. Nor have plaintiffs produced evidence supporting their contention that a submarket consisting of a single customer -- the U.S. Government -- has any economic significance. Why other purchasers of electronic splices and components such as commercial airlines, state governments, and the communications industry should be excluded from the marketplace for purposes of this case has not been addressed."

Appx. 38-39.

A review of Brown Shoe's "practical indicia" in light of the meager facts adduced by petitioner [5/] establishes

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5/ Petitioners' sole efforts to define a "relevant market" were as follows:

(a) that Buchanan attempted to convert Thomas & Betts part

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beyond a doubt that the "relevant

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numbers to comparable AMP parts numbers, T. 259, 269;

(b) that Galardo knew of "quite a few manufacturers of electronic terminals and connectors", T. 601, including 3M, T. 599, Belden, Mallory, and Sprague, T. 601, and presumably all those identified in (1) the Northern California Electronic Buyer's Guide, T. 667, which was not even offered into evidence; (2) Buchanan's library of catalogs "from the various manufacturers", T. 500, none of which were offered into evidence; and (3) otherwise unidentified documents consulted by Galardo when she "went to libraries and looked and read what was [sic] electrical parts and connectors and terminals", T. 500;

(c) that some of AMP's competitors, as identified upon Term-Con's "Line Card", DX 818, included "Hollingsworth, Thomas & Betts, and Raychem", T. 672;

(d) that Buchanan, Galardo, and a former AMP salesman believed

[FOOTNOTE CONT'D. ON FOLLOWING PAGE]

submarket" advanced by petitioner does

[FOOTNOTE CONT'D. FROM PREVIOUS PAGE]

AMP's Picabond parts to be covered by United States Letters Patent, T. 342, 680, and 719;

(e) that supplies needed by the federal government to carry out the functions of its various agencies are identified in a publication entitled Commerce Business Daily, T. 247-248, 552-553, and 662, no issues of which were introduced into evidence;

(f) that Buchanan, Galardo, and the 3M Company believed 3M's "Scotchlok" products to be equivalent to AMP's Picabond products, T. 417-418, 442, 446-448, 706-707, and 740-741; PX 703;

(g) that Galardo and Term-Con's "Vice President - Sales", Don Allen, represented in a March 9, 1979 "pre-award survey" to government procurement officials, PX 314, that AMP's Picabond part number 61226-2 could also be obtained from Thomas & Betts and Hollingsworth Solderless Terminal Co., T. 2202-2203;

[FOOTNOTE CONT'D. ON FOLLOWING PAGE]

not exist.

a. Industry Recognition.

This factor may be established by direct industry testimony, General Foods Corp. v. F.T.C., 386 F.2d 936, 941 (3d Cir. 1966), cert. denied, 391 U.S. 919 (1968); United States v. Black and Decker Mfg. Co., 430 F.Supp. 729, 737-38 (D. Md.

[FOOTNOTE CONT'D. FROM PREVIOUS PAGE]

(h) that Galardo and Allen also represented, during the course of a June 1979 "pre-award" survey, PX 313, that "Pyramid Electronics Supply[,] Hackensack, N.J." were "source[s]", other than CKG, for AMP's Picabond part number 60947-3; and

(i) that Raymond S. Lym, an employee of the United States Defense Contract Administration Service Management Area, San Francisco, who supervised the June and March, 1979 "pre-award surveys" of Term-Con, believed that AMP's Picabond part number 61226-2 could be obtained by Term-Con from Thomas & Betts. T. 2206.

1976); consumer or purchaser preference, United States v. Philadelphia National Bank, 374 U.S. 321, 356-57 (1963); United States v. Connecticut National Bank, 418 U.S. 656 (1974); United States v. Grinnell Corp., 384 U.S. 563 (1966); or purchaser recognition. Babcock & Wilcox Co. v. United Technologies Corp., 435 F.Supp. 1249 (N.D. Ohio 1977); United States v. Bethlehem Steel Corp., 168 F.Supp. 576 (S.D.N.Y. 1958); United States v. General Dynamics Corp., 341 F.Supp. 534 (N.D. Ill. 1972), aff'd on other grounds, 415 U.S. 486 (1974).

Petitioners adduced no such evidence.

b. Public Recognition.

This element can be established by evidence of purchaser preference. Philadelphia National Bank, supra; Connecticut National Bank, supra; Grinnell, supra.

It is sometimes discussed in the context of a "cluster of products or services" where there is a strong customer preference for a particular family of products or services. It also overlaps with Brown Shoe's "distinct customer" criterion, or may be established by evidence of customer recognition. Babcock & Wilcox, supra; Bethlehem Steel, supra; General Dynamics, supra.

Petitioners adduced no such evidence.

c. Peculiar Characteristics and Uses.

This factor may be established by evidence of substitutability for use, 6/

6/ In a government procurement context, as here, one commentator has recently observed that "proof of supply substitutability may be difficult to establish." R. McMillan, "Special Problems in Section 2 Sherman Act Cases Involving

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Liggett & Myers, Inc. v. F.T.C., 567 F.2d 1273, 1274 (4th Cir. 1977); United States v. Continental Can Co., 378 U.S. 441, 449 (1964); Bethlehem Steel, supra; by showing the unique physical characteristics of the product, FTC v. Proctor & Gamble Co., 386 U.S. 568, 571 (1967); General Foods, supra; United States v. Crowell Collier & MacMillan, Inc., 361 F.Supp. 983, 1001 (S.D.N.Y. 1973), or by evidence that there are no effective substitutes. Proctor & Gamble, supra; United States v. Kennecott Copper Corp., 231 F.Supp. 95, 99 (S.D.N.Y. 1964), aff'd per curiam, 381 U.S. 414 (1965).

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Government Procurement: Market Definition, Measuring Market Power, and the Government as Monopsonist", 51 Antitrust L.J. 689, 697 (1983).

Here, petitioners adduced conflicting evidence, at best. Thus, there was testimony, T. 342, 680, 719, that AMP's Picabond products were claimed in United States Letters Patents, although no such patent was introduced into evidence. However, there was contrary evidence that petitioners believed 3M Company's "Scotchlok" products to be the equivalent of AMP's Picabond telephone splice. T. 417-418, 442, 446-448, 706-707, 740-741; PX 703. At best, this Brown Shoe indicator is neutral on the existence of petitioners' claimed submarket.

d. Unique Production Facilities.

This factor requires some evidence of the plants and equipment involved. Brown Shoe, supra; Kennecott Copper, supra.

Petitioners adduced no such evidence.

e. Distinct Customers.

This factor is normally defined by the product itself. Liggett & Myers, supra.

Petitioners offered no probative, much less any, evidence that the government was the only purchaser of AMP parts, or Picabonds. The District Court found exactly the opposite to be true. Appx. 37-41; see, also, fn. 2, supra.

f. Distinct Prices And Sensitivity To Price Changes.

These elements normally focus on price differentials, United States v. Mrs. Smith's Pie Co., 1977-1 CCH Trade Cas. ¶ 61,518 (E.D. Pa. 1976), price by use, Black & Decker, supra, 430 F.Supp. at 739, or a price comparison. Mrs. Smith's Pies, supra.

Petitioners adduced no such evidence.

g. Specialized Vendors.

This element focuses on the specifics of the distribution network or on the method by which the product in question is distributed. Mrs. Smith's Pies, supra; Black & Decker, supra.

Petitioners adduced no such evidence.

Given petitioners' "proof", as summarized above, the courts below correctly determined that there never was any Brown Shoe "submarket" defined by "the sale of AMP parts (or AMP Picabond parts) to the United States Government."

2. Even If There Were Substantial Evidence of a Relevant Market, Petitioners Adduced No Evidence of Any Significant Anticompetitive Effects in That Market.

An antitrust plaintiff cannot establish a Rule of Reason violation of Section 1 of the Sherman Act unless he

proves that the defendant's conduct had significant anticompetitive effects in the relevant market. National Society of Professional Engineers v. United States, 435 U.S. 679, 691-692 (1978). There was no evidence adduced by petitioners at trial that the withdrawal of CKG's preferential pricing had any effect at all on competitive conditions in any market.

The issue of whether a particular business practice has adversely affected competitive conditions in a particular market is one which cannot be adequately resolved without the benefit of detailed economic analysis -- which can come only from the testimony of expert economists. At trial, petitioners made no effort at all to present any such testimony. In this respect, the present case is strikingly similar to Tomac, Inc. v. Coca-Cola Co., 418 F.Supp. 359, 362 (C.D. Cal.

1976). The plaintiff in Tomac -- with its one economist who was called to testify on rebuttal after one day's study of the case -- presented considerably more economic evidence than did the petitioners here, who proffered no such evidence at all.

It is also clear that even if AMP had completely terminated its vendor-vendee relationship with petitioners, instead of merely withdrawing their preferential pricing, such conduct would have occasioned no substantial adverse effect on competitive conditions in any market. The only wrongful withdrawal of pricing which petitioners have alleged here was that extended to CKG. Ever since, the sale of AMP parts was handled directly by respondents. Thus, the present situation is not one where a supplier was no longer competing with other suppliers in a given

area. Rather, it is analogous to one where a supplier substitutes one distributor for another. In that circumstance, the courts will not find the anticompetitive effect necessary for a Rule of Reason violation, because the extent of competition remains unaffected; 7/ the terminating supplier's products are still being sold in all areas where they were

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7/ See, e.g, Cowley v. Braden Indus., Inc., 613 F.2d 751, 755 (9th Cir.), cert. denied, 446 U.S. 965 (1980); Daniels v. All Steel Equip., Inc., 590 F.2d 111, 113 (5th Cir. 1979); Lee Klinger Volkswagen v. Chrysler Corp., 583 F.2d 910, 914-15 (7th Cir.), cert. denied, 439 U.S. 1004 (1978); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 246, (5th Cir. 1978); Northwest Power Prods., Inc. v. Omark Indus., 576 F.2d 83, 90 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683, 686 (6th Cir. 1976); Dreibus v. Wilson, 529 F.2d 170, 172 (9th Cir. 1975); Ace Beer Distribs., Inc. v. Kohn, 318 F.2d 283, 287 (6th Cir.), cert. denied, 375 U.S. 922 (1963); Westpoint Pepperell, Inc. v. Rea, 1980-2 CCH Trade Cas. ¶ 63,341 at 75,744-745 (N.D. Cal. 1980).

sold previously -- it is just that in one such area, they are being sold by someone other than the plaintiff. Daniels v. All Steel Equip., Inc., 590 F.2d 111, 113 (5th Cir. 1979); Dreibus v. Wilson, 529 F.2d 170, 172 (9th Cir. 1975).

The lower courts have also applied identical reasoning to the case where a supplier starts selling its product directly in a former distributor's territory; [8] a supplier can "eliminat[e]

8/ See, e.g, Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1006-07 (5th Cir.), cert. denied, 454 U.S. 827 (1981); Associated Radio Servs. Co. v. Page Airways, Inc., 624 F.2d 1342, 1351 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1030 (2d Cir.), cert. denied, 444 U.S. 917 (1979); Naify v. McClatchy Newpapers, Inc., 599 F.2d 335, 337 (9th Cir. 1979); Knutson v. Daily Review, Inc., 548 F.2d 795, 805 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977); Trixler Brokerage Co. v. Ralston Purina

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distributors of its products by vertical integration (i.e, by beginning distribution of its own products) without running afoul of the antitrust laws." Associated Radio Servs. Co. v. Page Airways, Inc., 624 F.2d 1342, 1351 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). Again, the rationale underlying such decisions is obvious: the extent of competition is in no way lessened by

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Co., 505 F.2d 1045, 1051 (9th Cir. 1974); Clarke v. Amerada Hess Corp., 500 F.Supp. 1067, 1074 (S.D.N.Y. 1980); Donald B. Rice Tire Corp. v. Michelin Tire Corp., 483 F.Supp. 750, 753, 760-61 (D. Md. 1980), aff'd, 638 F.2d 15 (4th Cir.), cert. denied, 454 U.S. 864 (1981); Foremost Int'l Tours, Inc. v. Qantas Airways, 478 F.Supp. 589, 600-01 (D. Haw. 1979), aff'd, 649 F.2d 967 (9th Cir.), cert. denied, 454 U.S. 967 (1981); Newberry v. Washington Post Co., 438 F.Supp. 470, 484 (D.D.C. 1977); McGuire v. Times Mirror Co., 405 F.Supp. 57, 64, 66 (C.D. Cal. 1975); Millarcek v. Miami Herald Pub. Cc., 388 F.Supp. 1002, 1005-06 (S.D. Fla. 1975).

substituting a direct sales outlet for an independent distributor. The cases uniformly hold that the loss of one distributor from a particular industry is insufficient to establish the requisite anticompetitive impact which needs to be shown before a Rule of Reason violation can be found. E.g, Franklin Music Co. v. American Broadcasting Co., Inc., 616 F.2d 528, 541 (3d Cir. 1979); Cartrade, Inc. v. Ford Dealers Advertising Ass'n, 446 F.2d 289, 294 (9th Cir. 1971), cert. denied, 405 U.S. 997 (1972). As the Ninth Circuit stated in Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977),

> "A termination is not unlawful because of some adverse effect on the distributor's business, even if the effect is the elimination of the distributor from the market. The complaining distributor must show that the refusal to deal was intended to or did bring about some

> restraint of trade beyond the loss of business suffered by the distributor or the market's loss of a distributor-competitor."

548 F.2d at 803.

In conclusion, this case is far different from those few cases since Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), where Rule of Reason violations under Section 1 of the Sherman Act have been found. In all such cases, the nature of the alleged restraint was such that it affected great numbers of competitors, not just a single businessperson. 9/ Here, in contrast, the only

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9/ See, National Society of Professional Engineers v. United States, 435 U.S. 679, 694-95 (1978) (ban on competitive bidding affected all engineers belonging to appellant society and all customers of those engineers); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1374 (5th Cir. 1980) (defendant's membership requirements affected a

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"adverse effect" that has been shown is AMP's termination of CKG's special pricing. No other distributor has been shown to have been terminated.

Thus, the evidence adduced in this case fully supports the determinations of

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majority of realtors within the relevant geographic market; it was the only multiple listing service within that market); Virginia Academy of Clinicial Psychologists v. Blue Shield of Va., 624 F.2d 476, 485 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) (challenged Blue Shield insurance restrictions had a wide impact because Blue Shield was the dominant health insurer within the relevant geographic market); Eiberger v. Sony Corp. of America, 622 F.2d 1068, 1079-80 (2d Cir. 1980) (Sony's territorial restrictions upon its distributors clearly affected all distributors and substantially reduced intrabrand competition); Smith v. Pro-Football, Inc., 593 F.2d 1173, 1185-86 (D.C. Cir. 1978) (challenged NFL draft rule affected all NFL clubs and the players with which they deal); Mardirosian v. American Institute of Architects, 474 F.Supp. 628, 645-48 (D.D.C. 1979) (challenged AIA rule affected all member architects and their clients).

the courts below that petitioners failed to demonstrate any injury to competition in a Rule of Reason context.

CONCLUSION

The courts below fully considered the issues, the controlling decisions, and the evidence adduced by petitioners in concluding that respondents were incapable of conspiring, and that there was no injury to competition in any definable market. The jury rendered its special verdict that respondents breached none of the contracts which it found to exist.

The actual issues at bar are run-of-the-mill. Notwithstanding, petitioners apparently desire to obtain the sterile result of a determination of the criteria by which an "intra-corporate conspiracy" may be identified.

Since this Court's articulation of any such new set of criteria cannot

change the results achieved below, respondents respectfully urge that the Petition for Certiorari be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of California)
) ss.
City and County of San Francisco)

Josie Strupaitis, being first duly sworn upon oath, deposes and says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 235 Montgomery Street, Suite 420, San Francisco, California 94104; that affiant served three, true and correct copies of the attached **Brief In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit** on the following person, by placing same in an envelope addressed as follows:

Thomas E. Schatzel, Esq.
Law Offices of Thomas E. Schatzel, P.C.
3211 Scott Boulevard, Suite 201
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that said envelope was then, on September 19, 1983, sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service

by United States Mail at the place so addressed, or that there is regular communication by mail between the place of mailing and the place so addressed.

Jane Stumpaitis

Subscribed and sworn to
before me this 19th day
of September, 1983

Arthur L. Martin

Notary Public in and for
the City and County of
San Francisco, State of
California